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In The

Supreme Court of the United States

October Term 1995

KAYSER-ROTH CORPORATION,

Petitioner,

v.

SARA LEE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Alan W. Duncan
Counsel of Record
Jonathan A. Berkelhammer
Matthew W. Sawchak
SMITH HELMS MULLISS & MOORE, L.L.P.
300 North Greene Street
Suite 1400
Post Office Box 21927
Greensboro, North Carolina 27420
(910) 378-5200

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

QUESTIONS PRESENTED

1. Whether a trademark owner can be enjoined from using a generic term in an otherwise non-infringing composite trademark.

2. Whether, under the Lanham Act, a court can limit the use of a federally registered and incontestable trademark.

3. Whether, under this Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), a court of appeals can reverse a district court's findings of fact without deciding that the factual findings were implausible.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Petitioner Kayser-Roth Corporation is owned by Synchro S.A. de C.V. Kayser-Roth Corporation has an interest in KR-AK Realty LLC.

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PETITION FOR WRIT OF CERTIORARI

Kayser-Roth Corporation respectfully petitions this Court to issue a writ of certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit giving rise to this petition is reported at *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455 (4th Cir. 1996), and is reprinted in the appendix ("App.") A-1 through A-33. The opinion of the United States District Court for the Middle District of North Carolina is unpublished and is reprinted at App. A-34 through A-154.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on 17 April 1996. Kayser-Roth's Petition for Rehearing with Suggestion for Rehearing In Banc was denied 24 May 1996, with Judge Widener dissenting. App. A-155.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

Pertinent text from the Lanham Act, 15 U.S.C. §§ 1051-1 through 1128, is set out at App. A-156 through A-169.

STATEMENT OF THE CASE

I. Factual Background

Petitioner Kayser-Roth Corporation ("Kayser-Roth") manufactures and sells ladies' hosiery products. Kayser-Roth owns the trademark "LEG LOOKS," registered on the Principal Register of the United States Patent and Trademark Office for ladies' hosiery and pantyhose. The "LEG LOOKS" trademark is incontestable pursuant to section 15 of the Lanham Act, 15 U.S.C. § 1065.

Respondent Sara Lee Corporation ("Sara Lee") is the nation's largest manufacturer and seller of ladies' hosiery products.[1] It owns the trademark "L'eggs," registered for ladies' hosiery and pantyhose. The "L'eggs" mark is a composite of the word "leg" and the word "egg."

Kayser-Roth has sold pantyhose under the "LEG LOOKS" mark since 1977. Since 1983, Kayser-Roth has spent over $12 million advertising its "LEG LOOKS" mark.

Sara Lee has been aware of and has monitored Kayser-Roth's sales of "LEG LOOKS" products for as long as Kayser-Roth has used the mark. For example, Sara Lee regularly tracked the level of sales of all of Kayser-Roth's "LEG LOOKS" products. Sara Lee even conducted a

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[1] Kayser-Roth is Sara Lee's only national competitor and may be best known for its No Nonsense® brand of pantyhose.

strategic study of Kayser-Roth in 1986, focusing a part of the intelligence report on the "LEG LOOKS" brand.

Sara Lee acknowledged Kayser-Roth's ownership of the "LEG LOOKS" mark in a 1991 settlement agreement with Kayser-Roth. The settlement arose from Kayser-Roth's opposition to Sara Lee's trademark application for the mark "LINGERIE LOOKS" for use on pantyhose. To avoid confusion that might arise between Kayser-Roth's trademark "LEG LOOKS" and Sara Lee's mark "LINGERIE LOOKS," Sara Lee agreed that it would add its "L'eggs" mark to the name and always use it prominently, "in direct visual proximity to the words 'LINGERIE LOOKS.'" Sara Lee thus acknowledged that use of its "L'eggs" mark would differentiate its pantyhose from Kayser-Roth products bearing the "LEG LOOKS" mark and thereby prevent confusion.

In 1992, Kayser-Roth launched a new line of spandex pantyhose to compete with Sara Lee's "SHEER ENERGY" line. Kayser-Roth named its new entrant "LEG LOOKS" Invigorating Pantyhose by "NO NONSENSE."

II. Procedural Background

In September 1992, Sara Lee challenged, among other things, the trade dress for Kayser-Roth's "LEG LOOKS" Invigorating Pantyhose by "NO NONSENSE" (the "1992 packaging"). Sara Lee sought preliminary and permanent injunctive relief and monetary damages. Jurisdiction in the District Court was based on 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1331, 1338, and 1367(a).

Kayser-Roth denied the material allegations in the amended complaint, interposed affirmative defenses, and counterclaimed. After a hearing on Sara Lee's motion for a preliminary injunction, the District Court preliminarily

enjoined Kayser-Roth from using the 1992 packaging. The District Court expressly held, however, that Kayser-Roth was not "prevent[ed] from using the name Leg Looks®." App. A-44.

Kayser-Roth withdrew its 1992 packaging from the market and introduced a new package in 1993 (the "1993 package"). Sara Lee responded by supplementing its amended complaint to allege that the 1993 package infringed not only Sara Lee's "SHEER ENERGY" trade dress, but that it also infringed the "L'eggs" trademark.

Sara Lee's second motion for a preliminary injunction was referred to a magistrate judge. After a ten-day hearing, the magistrate judge recommended that Kayser-Roth be enjoined from using its federally registered and incontestable trademark "LEG LOOKS."

Kayser-Roth objected to the magistrate judge's recommendation. On *de novo* review, the District Court found "that the word 'leg' is generic with respect to pantyhose" and, therefore, held that Kayser-Roth could not be enjoined from using the word "leg." The District Court also found that there was no likelihood of confusion between the "LEG LOOKS" mark and the "L'eggs" mark, that Sara Lee had acquiesced in Kayser-Roth's use of the "LEG LOOKS" mark, and that Sara Lee was guilty of laches. A final judgment dismissing Sara Lee's claims was entered.

The Fourth Circuit reversed. Rejecting the factual findings of the District Court, the Fourth Circuit found that the common word "leg" created a likelihood of confusion between Kayser-Roth's "LEG LOOKS" mark and Sara Lee's "L'eggs" mark arising solely from the word "leg." The Fourth Circuit also found that Sara Lee was not estopped by either laches or acquiescence from asserting its claims. As a result, the Fourth Circuit directed that Kayser-Roth be enjoined from using the "LEG LOOKS" mark in all

channels of trade in which the "L'eggs" mark currently is sold.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's decision creates a conflict among the circuits concerning the use of generic terms in trademarks and eviscerates the principle that generic terms are not subject to trademark protection.

The District Court held "that the word 'leg' is generic with respect to pantyhose." App. A-118. It further found that the word

> [l]eg is . . . an abbreviation of "legwear," one of the generic terms that refers to the genus of apparel of which pantyhose are a part. The word relates, therefore, to the inherent nature of pantyhose generally.

App. A-118. Finding no other significant similarities between the marks "LEG LOOKS" and "L'eggs," the District Court concluded that "because the word 'leg' is generic, it may legally be used as part of an otherwise non-infringing pantyhose trademark." App. A-17.

The Fourth Circuit disagreed and thus prohibited Kayser-Roth from using the generic term "leg" in its composite mark "LEG LOOKS." App. A-17 . The basis of the Fourth Circuit's decision was its finding that consumer confusion between the two marks emanated from the word "leg." Thus, according to the Fourth Circuit, use of the "LEG LOOKS" mark should be enjoined, even if the only

source of confusion was the generic term "leg."[2] The Fourth Circuit, therefore, held as follows:

> where the defendant in an infringement case has elected to use a mark similar to that of a competitor's distinctive mark, and, as a result, has actually confused the public, *our inquiry ends almost as soon as it begins.*

App. A-23 (emphasis added).

The decision of the Fourth Circuit conflicts with decisions of the Second and Third Circuits, as well as the leading scholarship on trademark law, by holding that a finding of likelihood of confusion can be based only on the use of common generic terms. For example, in *Dranoff-Perlstein Ass'n v. Sklar*, 967 F.2d 852 (3d Cir. 1992), the Third Circuit considered whether the owner of the service mark "INJURY-1," used in advertising for plaintiffs' personal injury lawyers, could enjoin use of the service mark "INJURY-9." The district court found the term "INJURY" generic and granted the defendant's motion for summary judgment. The Third Circuit affirmed this finding:

> we hold that personal injury law is properly regarded as its own genus, and that the term "INJURY," as contained in "INJURY-1," is

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[2] The Fourth Circuit's conclusion that there was a likelihood of confusion is contrary to the factual findings of the District Court and represents one of many instances of fact-finding by the Court of Appeals, which is a "depart[ure] from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). The Fourth Circuit's improper treatment of the District Court's factual findings is discussed in Section III, *infra*.

> "so commonly descriptive of the name of the [service] that we should consider it generic." *See [A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 298 (3d Cir. 1986)] . . . . [Plaintiff's] competitors may not be precluded from using the term "INJURY" in their advertising, or even as part of their telephone numbers. *To do so would be to deny competitors the right to call the practice of personal injury law by its name*.

Id. at 860 (emphasis added).

Importantly, the Third Circuit continued its analysis by focusing on the non-generic part of the service mark, reasoning that "any finding of infringement . . . must be based primarily on a likelihood of confusion between the suffixes '1' and '9.'" *Id.* at 861-62.

Similarly, in the present case, after "finding . . . the word 'leg' . . . generic with respect to pantyhose," App. A-118, the District Court focused on whether there was a likelihood of confusion from the non-generic terms of each mark -- "LOOKS" and "eggs." App. A-119 through A-120. Based on its review of the record, the District Court found as a fact that there was no likelihood of confusion.

The decision of the Fourth Circuit also conflicts with the decision of the Second Circuit in *American Cyanamid Corp. v. Connaught Labs. Inc.*, 800 F.2d 306 (2d Cir. 1986). In that case, the Second Circuit held that the owner of the trademark "HIB-IMUNE" could not enjoin use of the trademark "HibVAX." The district court granted the plaintiff's motion for a preliminary injunction and required a recall of all "HibVAX vaccine already shipped." *Id.* at 307. The Second Circuit, however, "reverse[d] and order[ed] the complaint dismissed." *Id.* The Second Circuit explained:

> A trademark holder cannot appropriate generic or descriptive terms for its exclusive use, and a trademark infringement finding thus cannot be based on the use of a generic or descriptive term such as "Hib." . . .
>
> . . . [B]ecause the generic term "Hib" may not be appropriated by [plaintiff] for its exclusive use, any likelihood of confusion between HibVAX and HIB-IMUNE, and any consequent finding of infringement, must be based on a similarity between the suffixes "VAX" and "IMUNE." The very statement of the issue, however, resolves it.

Id., 800 F.2d at 308; *accord Smithkline Beckman Corp. v. Proctor & Gamble Co.*, 591 F. Supp. 1229, 1238 (N.D.N.Y. 1984) (no infringement possible when similar "RIN" ending of both ECOTRIN and ENCAPRIN is a derivative of the generic word "aspirin"), *aff'd mem.*, 755 F.2d 914 (2d Cir. 1985); Restatement (Third) of Unfair Competition § 21 cmt. c (1993) [hereafter Restatement] ("Similarities that are attributable to the use of only unprotected elements will not support a finding of infringement.").[3]

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[3] As one court observed:

> Bethlehem Steel, Goodyear Tire, and Allied Chemical, for example, are unquestionably protectable trademarks. It does not follow that the owners of such marks can prevent competitors in the steel, tire and chemical industries from using the words steel, tire, or chemical as a part of their names.

The analysis employed by the Second and Third Circuits is directly contrary to the analysis of the Fourth Circuit, which, upon finding confusion arising from use of the generic prefix "leg," ended its inquiry "almost as soon as it beg[an]," App. A-23, and refused to analyze the non-generic portions of the marks.

The District Court, in contrast, engaged in the very analysis the Second and Third Circuits had established. After finding the term "leg" generic with respect to pantyhose, the District Court evaluated the likelihood of confusion between the nongeneric parts of the two marks -- "LOOKS" and "eggs." Finding no likelihood of confusion between these terms, the District Court found in favor of Kayser-Roth. App. A-120.

In addition to the legal conflicts it creates, the decision of the Fourth Circuit has far-reaching, adverse implications for the business community. Based on settled trademark law, merchants have long understood that "[a] seller . . . cannot remove a generic term from the public domain and cast upon competitors the burden of using an alternative name." Restatement § 15(1) cmt. b; *accord Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 116 (1938) ("Since the term is generic, the original maker of the product acquired no exclusive right to use it."); *Delaware & Hudson Canal Co. v. Clark*, 80 U.S. (13 Wall.) 311, 323 (1872) ("Nor can a generic name . . . be employed as a trademark and the exclusive use of it be entitled to legal protection.").

(..continued)

Expoconsul Int'l Inc. v. A/E Sys., Inc., 755 F. Supp. 1237, 1246 (S.D.N.Y. 1991).

Relying on this important principle, businesses market their products with an understanding that "[g]eneric names are regarded by the law as free for all to use." 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12.01[2] (3d ed. 1992); *see also* Restatement § 15(1) ("A user cannot acquire rights in a generic designation as a trademark . . . .").

The prohibition of trademark rights in generic terms benefits the consuming public by allowing sellers to mark their products effectively and, indeed, to identify the genus of goods, such as products for the leg, with which they might compete. In contrast, the "recognition of trademark rights in generic designations could significantly impede competition in the market for the goods or services denominated by the generic term." Restatement § 15(1) cmt. a.

Under the Fourth Circuit's reasoning in this case, the first user of a term could "effectively preempt competition by claiming that term as its own." *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 305 (3d Cir. 1986). Thus, according to the Fourth Circuit, Pfister and its Pforever Pfaucet® can prevent all other competitors from using the generic term "faucet" in naming their products. This result circumvents the principle of genericness.

In sum, the Fourth Circuit's decision conflicts with the Second and Third Circuits decisions that, on similar facts, prohibit trademark rights in generic terms. The decision also creates uncertainty for the business community by challenging the free use of generic terms in the naming and selling of products. These issues present substantial questions meriting review by this Court.

II. The Fourth Circuit's decision improperly restricts Kayser-Roth's federally registered and incontestable trademark in contravention of the statutory scheme set out in the Lanham Act.

The Fourth Circuit has decided that Kayser-Roth's federally registered and incontestable trademark "LEG LOOKS" can no longer be used on any products "placed in the same channels of distribution as those in which Sara Lee's L'eggs® products are currently sold." App. A-24. The phrase "channels of distribution" was used by the Fourth Circuit to mean retail outlets. The Fourth Circuit, therefore, has limited Kayser-Roth's "LEG LOOKS" mark to certain retail stores in the face of its unlimited federal registration. This ruling departs from the registration scheme of the Lanham Act by denying Kayser-Roth the benefits of its incontestable registration without requiring a showing that any of the statutory exceptions to incontestability exist.

The Lanham Act provides that the registration of the "LEG LOOKS" mark constitutes "prima facie evidence of [its] validity . . . and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate." 15 U.S.C. § 1115(a); *see also* 15 U.S.C. § 1057(b). The incontestable status of "LEG LOOKS" constitutes conclusive evidence of the validity of the mark, subject to any conditions or limitations in the registration. 15 U.S.C. § 1115(b).

Kayser-Roth's federal registration for the trademark "LEG LOOKS" covers the category "hosiery and pantyhose." No limitations or restrictions encumber the "LEG LOOKS" registration. Thus, Kayser-Roth's rights in its "LEG LOOKS" mark are conclusively presumed to be as broad as its registration. These rights thus extend to the sale of hosiery and pantyhose of any type and in any channel of

distribution. *See San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 685 (C.C.P.A. 1977); *see also CBS Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983) (absent specific limitations in a registration, the recited goods are considered to be used in the "normal and usual channels of trade and methods of distribution"); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 U.S.P.Q. 960, 965 (T.T.A.B. 1980) (registration invokes a prima facie presumption that the "goods or services [recited in the registration] move through all channels of trade suitable for goods and services of that type, and that they reach all purchasers and potential purchasers," regardless of the registrant's business practices at the time of the mark's registration).

When Sara Lee challenged Kayser-Roth's use of the "LEG LOOKS" mark, Kayser-Roth already was using it in the food, drug, and mass merchandising channels of trade. The Fourth Circuit, however, enjoined use of the mark in retail outlets where it already was being used. This decision, excluding a registered mark from channels of trade in which it is being used at the time of the challenge, injects uncertainty into the registration system:

> If, in considering the question of restriction of a registration . . . we were to look to the nature of the use made by the registrant as of the time it sought registration of its mark, as opposed to the time a restriction to the registration is sought, we would be injecting into the trademark registration system a strain of uncertainty. Any normal expansion of commerce, in the form of either a new product formulation or a new trade channel . . . would bring with it the question of whether such

> expansion of trade was protected by the existing registration . . . .

Procter & Gamble Co. v. Sentry Chem. Co., 22 U.S.P.Q.2d 1589, 1593 (T.T.A.B. 1992), *overruled on other grounds*, *Eurostar Inc. v "Euro-Star" Reitmoden GmbH & Co.*, 34 U.S.P.Q.2d 1266 (T.T.A.B. 1994).

As a result of the Fourth Circuit's decision, the owner of an incontestable trademark can never be certain that it is protected if it expands its sales into additional retail outlets, let alone in the general expansion of trade for the goods named in the registration. Under the Fourth Circuit's reasoning, an incontestable trademark, therefore, never constitutes the conclusive evidence of validity as to the goods listed in the registration as was intended by Section 33(b) of the Lanham Act, 15 U.S.C. § 1115(b).

The decision of the Fourth Circuit thus nullifies the presumptions of validity afforded a registered, incontestable mark and undermines the integrity of the registration system. The need to maintain certainty in the Lanham Act registration system presents a substantial federal question of national importance warranting review by this Court.

III. The Fourth Circuit's failure to follow the standard of review articulated in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and its reliance instead on a pre-*Anderson* decision represents a departure from the accepted and usual course of judicial proceedings, warranting exercise of this Court's supervisory powers.

In *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), this Court set out the appropriate standard for

reviewing factual findings made by a district court sitting without a jury:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Id. at 573-74.

Rather than apply the teachings of *Anderson* the Fourth Circuit applied a more liberal standard of review from a decision pre-dating *Anderson*: "Upon reviewing the district court's finding to the contrary, we cannot help but be left with a 'definite and firm conviction that a mistake has been made.'" App. A-24 (quoting *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984)).[4] Reliance on this principle, without more, was improper:

> [It] plainly does not entitle a reviewing court to reverse the finding of the trier of fact

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[4] It should be noted that *Anderson* came to the Court by writ of certiorari to the United States Court of Appeals for the Fourth Circuit from an opinion written by the Honorable K.K. Hall, who also authored the decision in this case. The Court of Appeals in *Anderson* likewise applied the standard it applied in this case, *see*, *Anderson v. City of Bessemer City*, 717 F.2d 149, 154 (4th Cir. 1983) ("we are 'left with the definite and firm conviction that a mistake has been committed'"), *rev'd*, 470 U.S. 574 (1985).

> simply because it is convinced that it would have decided the case differently.

Anderson, 470 U.S. at 573.

The District Court issued a one hundred-thirty-eight page Memorandum Opinion. It specifically noted that it "ha[d] painstakingly reviewed all of the materials in the record, including thousands of pages of testimony, dozens of packages, and hundreds of documents." App. A-39 (footnote omitted).

Based on its review, the District Court concluded that: (1) Sara Lee had not demonstrated a likelihood of confusion between the marks; (2) Sara Lee was estopped by laches from asserting its claims; and (3) Sara Lee had acquiesced in Kayser-Roth's use of the "LEG LOOKS" mark.

The Fourth Circuit reversed the detailed factual findings of the District Court. As the following examples reveal, the Fourth Circuit simply chose to weigh the evidence differently than did the District Court. This appellate-court fact-finding was wholly improper and warrants the exercise of this Court's supervisory powers to ensure that the federal appellate courts understand the proper scope of review of factual findings of the federal trial courts and comply with the decisions of this Court.[5]

A. The Fourth Circuit substituted its view of the evidence on likelihood of confusion for that of the District Court.

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[5] As the record in this case amply demonstrates, Kayser-Roth devoted considerable "energies and resources on persuading the trial judge that [its] account of the facts [was] the correct one." *Anderson*, 470 U.S. at 575. It should not have been required, as it was here, "to persuade three more judges at the appellate level." *Id.*

The Fourth Circuit engaged in improper fact-finding on the issue of confusion. "The [D]istrict [C]ourt in this case, for some 20 pages, analyzed in detail the evidence of likelihood of confusion." App. A-30 (Widener, J., dissenting). Contrary to the mandate of *Anderson*, the Fourth Circuit merely concluded that the "[District Court] *miscalculated* the likelihood of . . . confusion." App. 10 (emphasis added).

The Fourth Circuit's fact-finding represents such a departure from the accepted and usual course of judicial proceedings that it steps into the realm of speculation: "indeed, we can but wonder how often the experiences related by the trial witnesses have been repeated -- but not reported -- in stores across the country." App. A-21. No factual basis for these musings on the existence of rampant confusion can be found in the opinion, nor does the Fourth Circuit address why the District Court was wrong in its conclusion.

Also, in finding as it did that there was no likelihood of confusion between the trademark "LEG LOOKS" and the trademark "L'eggs," the District Court made the subsidiary finding that "[n]either of [Sara Lee's] surveys is . . . sufficiently reliable . . . to accord the proffered results much weight." App. A-141.[6] The weight to accord this evidence was solely within the discretion of the District Court. The Fourth Circuit, however, found otherwise:

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[6] The District Court found the surveys flawed principally because of "the selection of an inappropriate control." App. A-141. Additional flaws also were noted. App. A-142 through A-144.

> The [D]istrict [C]ourt discounted the survey evidence on the ground that its reliability may have been in question, but even if the true figure were only half of the survey estimate, actual confusion would, in our view, nevertheless exist to a significant degree.

App. A-21 through A-22 (footnote omitted).

The Fourth Circuit offers no explanation to support its guess that actual confusion may be half of the survey results, or for disregarding the District Court's findings. Neither logic nor mathematics, much less appellate procedure, supports the Fourth Circuit's re-weighing of this evidence.

The District Court also found that the parties' marks were dissimilar, with the only commonality between them being use of the generic term "leg." According to the District Court, "the spelling and punctuation of the marks are quite different." App. A-119 through A-120. The Fourth Circuit again found the facts to be to the contrary.

That the Fourth Circuit engaged in independent fact-finding is clear, for it announces that "[w]e now consider briefly the similarity of the two marks . . . ." App. A-19. It was, of course, the province of the District Court, not the Fourth Circuit, to "consider" the evidence and to find the facts.

Far from considering the similarity of the two marks "briefly," the District Court comprehensively reviewed the evidence and discussed its analysis extensively in its Memorandum Opinion. The Fourth Circuit's brief discussion, which covers less than one page of its opinion, does not state why the District Court's evidentiary findings were implausible. Rather, the Fourth Circuit simply reached a different conclusion, based on its perception of the

similarities stemming solely from Kayser-Roth's use of the generic term "leg." This re-weighing of evidence constitutes error, even if the Fourth Circuit were "convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

B. The Fourth Circuit overruled the District Court's factual findings of estoppel by laches and acquiescence.

The District Court found that the relevant product market for purposes of analyzing the defenses of laches and acquiescence was the national retail pantyhose market. App. A-109. Its analysis on this point covers over eight pages of the Memorandum Opinion. App. A-104 through A-110. Determining that Sara Lee knew of Kayser-Roth's use of the "LEG LOOKS" mark during the entire period of its use and monitored its level of sales, App. A-103, the District Court held that Sara Lee's claims were barred by the doctrine of laches.

Without holding the District Court's factual findings regarding the relevant market implausible, the Fourth Circuit substituted its own view of the facts, determining that Sara Lee's conduct did not amount to laches when considered only with respect to the narrower food, drug and mass merchandising ("FDM") channels of trade. App. A-10 through A-11. This conclusion is no more than an improper re-weighing of the evidence concerning the relevant market in which pantyhose are sold.

The District Court also held that Sara Lee had acquiesced in Kayser-Roth's use of the "LEG LOOKS" mark. App. A-102. The District Court reached this conclusion based principally on its construction of a 1991 settlement agreement entered between Sara Lee and Kayser-

Roth concerning Kayser-Roth's opposition to Sara Lee's trademark application for the mark "LINGERIE LOOKS " for pantyhose.

Sara Lee acknowledged in the settlement agreement Kayser-Roth's ownership of the "LEG LOOKS" mark for hosiery and pantyhose. App. A-55. Sara Lee agreed "always to use the mark L'eggs® prominently and 'in direct visual proximity to the words LINGERIE LOOKS' and only in a particular stylized form." App. A-55.

Construing this settlement agreement, the District Court reasoned as follows:

> The parties would not have agreed to [add the mark L'eggs® to the name] if they had thought it would contribute to confusion about the source of their products. The condition supports the inference that neither [Sara Lee] nor [Kayser-Roth] believed that the name "L'eggs® Lingerie Looks" would be confused with the mark LEG LOOKS® despite their sharing of the word "leg."
>
> Less than a year later, [Kayser-Roth] relied on the registered status of the mark LEG LOOKS® when it chose to affix it to its new line of pantyhose. [Kayser-Roth's] reliance was rooted at least in part on [Sara Lee's] unconditional acknowledgment of [Kayser-Roth's] rights in the mark.

App. A-102 through A-103.

Once again, the Fourth Circuit reached a different result based on its own construction of the evidence:

> [I]t is obvious that the 1991 agreement was intended only to govern Sara Lee's future actions in marketing its Lingerie Looks brand; there is nothing in the agreement that can reasonably be construed to immunize Kayser-Roth from liability for all future uses . . . of any of its own marks.

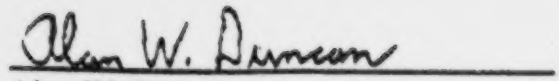
App. A-13. Although the District Court's findings rested on the construction of documentary evidence, the same standard of review is nevertheless applicable. *Anderson*, 470 U.S. at 574.

The Fourth Circuit never addresses why the District Court's assessment of the evidence was implausible. Being "convinced that it would have decided the case differently," *id.* at 573, which was the standard applied by the Fourth Circuit, is an insufficient basis for reversal of a district court's factual findings. *Id.* "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Id.* at 574. The standard of review employed by the Fourth Circuit so totally disregards this rule of controlling law that review by this Court is appropriate.

CONCLUSION

For the foregoing reasons, Kayser-Roth prays that this Court grant this petition for certiorari and reverse the judgment below.

This the 22nd day of August, 1996.



Alan W. Duncan
Counsel of Record
Jonathan A. Berkelhammer
Matthew W. Sawchak

Smith Helms Mulliss & Moore, L.L.P.
300 N. Greene St., Suite 1400
Post Office Box 21927
Greensboro, North Carolina 27420
Telephone: (910) 378-5200
Attorneys for Petitioner
Kayser-Roth Corporation